Supreme Court, U.S.
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No. 01-920

IN THE
Supreme Court of the United States

JAMES A. LAW, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JANICE C. LAW AND JAMES A LAW,

Petitioner,

v.

WALTER A. CAMP, M.D., BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, JAMES BRUNETTI, AND DICKERMAN HOLLISTER, JR., M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GREENWICH HOSPITAL, BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, AND JAMES BRUNETTI

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18 pp

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals for the Second Circuit properly affirmed the district court's granting of the hospital defendants' motion for summary judgment on the medical malpractice and corporate negligence claims pursuant to Connecticut law?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent, Greenwich Hospital, provides as follows:

Greenwich Hospital is a Connecticut non-stock corporation whose affairs are managed by a self-perpetuating Board of Trustees. There is no parent or publicly held company that owns 10 percent or more of the corporation's stock.

The sole member of Greenwich Hospital is Greenwich Health Care Services, Inc., a Connecticut non-stock corporation.

The affairs of Greenwich Health Care Services, Inc. are managed by a self-perpetuating Board of Directors.

The sole member of Greenwich Health Care Services, Inc. is Yale-New Haven Health Service Corporation, a Connecticut non-stock corporation (governed by a self-perpetuating Board of Directors).

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STATEMENT OF THE CASE

This brief in opposition to the petition for a writ of certiorari is submitted on behalf of the respondents, Greenwich Hospital, Frank Corvino, CEO and President of Greenwich Hospital, Bruce Warwick, Chairman of Greenwich Hospital's Board of Trustees, James Brunetti, M.D., Mitchell Kline, M.D., and Wei-Nchih Lee, M.D., (collectively the "hospital defendants").

The following are additional facts or clarifications of statements in the petition for a writ of certiorari.

This matter is a medical malpractice action brought by the plaintiff Law against the hospital defendants as well as defendants, Dr. Walter A. Camp, Dr. Francis X. Walsh, Dr. Arthur Rosenberg and Dr. Dickerman Hollister. The allegations of the complaint directed to the hospital defendants consisted of claims of medical malpractice and/or corporate negligence. *Law v. Camp*, 116 F. Supp.2d 295, 309 (D. Conn. 2000). The hospital defendants moved for summary judgment due to the failure of Law to set forth the requisite expert testimony as to standard of care, breach and proximate cause. *Id.* In opposition to the hospital defendants' motion for summary judgment, and in support of petitioner's cross motion for partial summary judgment, Law limited his argument to a claim of negligence per se regarding the removal of life support systems.

The only claim alleged against the hospital defendants that involves the issue of life support systems was the corporate negligence claim asserted against hospital defendants, Greenwich Hospital, Corvino and Warwick, alleging a failure to have a proper and fail-safe

protocol for determining brain death. *Law v. Camp*, 116 F. Supp. 2d at 309. There simply never have been any claims regarding life support status directed to hospital defendants Brunetti,[1] Lee, and Kline[2]. *Id.* As such, the only claim actually alleged against the hospital defendants which involved the issue of life support had nothing to do with the negligence per se claim argued below and is not even remotely related to the petitioner's hypothetical question presented in the petition for a writ of certiorari.

On July 26, 2000, the district court granted the hospital defendants' motion for summary judgment due to the failure of Law to proffer the requisite expert testimony as to standard of care, breach and/or proximate cause. *Law v. Camp*, 116 F. Supp. 2d at 310. As to hospital defendants Corvino and Warwick, the district court also granted summary judgment on the basis of the absence of personal liability under a theory of corporate negligence. *Id.*[3] The district court denied Law's motion for partial summary judgment premised upon a claim that the defendants had violated the provisions of Connecticut General Statutes

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[1] The petitioner never moved for partial summary judgment as to the hospital defendant Brunetti.

[2] Despite the obvious lack of interest of the hospital defendants in the outcome of the petition for a writ of certiorari, petitioner failed to provide the requisite notice pursuant to Rule 12.6 of the Rules of the Supreme Court of the United States.

[3] This independent basis for the granting of summary judgment in favor of hospital defendants Corvino and Warwick was not challenged on appeal to the United States Court of Appeals for the Second Circuit and is not an asserted basis in the petition for a writ of certiorari. This is further evidence of the obvious lack of interest in the outcome of the petition for a writ of certiorari by hospital defendants Corvino and Warwick.

Sections 19a-504 and 19a-571.[4] The district court denied petitioner's claim of negligence per se without expressly deciding whether said statutes were intended to set forth a legislative standard of care, and the court expressly holding that there was an absence of the requisite expert testimony regarding causation. *Id.* at 303-04.

The court of appeals for the second circuit affirmed the order of the district court denying Law's motion for partial summary judgment and granting the hospital defendants' motion for summary judgment on the malpractice claims and corporate negligence claims for substantially the reasons stated in Judge Nevas's thorough opinion. The court of appeals also rejected petitioner's Fourteenth Amendment claim due to the absence of the requisite State action. On October 5, 2001, the court of appeals denied the petitioner's petition for rehearing en banc.

REASONS FOR DENYING THE PETITION

The sole question presented by this petition is whether expert testimony is required as to standard of care, breach and proximate cause in a medical malpractice or corporate negligence claim against physicians, hospitals and administrators under Connecticut law. This case presents nothing other than State law issues that have been definitively and consistently decided by the State of

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[4] The petition for a writ of certiorari is based solely on the provisions of Connecticut General Statutes Section 19a-571.

Connecticut Supreme Court. Consequently, as demonstrated below, there is no compelling reason to grant the petition.

Petitioners argue that the court of appeals' opinion holds that Connecticut General Statutes Section 19a-571 allows for physician assisted intentional hastening of death in violation of the Fourteenth Amendment and in conflict with the decisions of this Court in the cases of *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990) and *Vacco v. Quill*, 521 U.S. 793 (1997). Petitioners inarticulately argue that Connecticut General Statutes Section 19a-571 is unconstitutional under the Fourteenth Amendment as allowing for the intentional hastening of a patient's death by a physician.

Neither the court of appeals' actual ruling, nor the record below, raise the question attempted to be presented by the petition. In fact, there was no claim whatsoever of a violation of the Fourteenth Amendment made in the district court. The Fourteenth Amendment claim that was attempted to be asserted to the court of appeals was not that Connecticut General Statutes Section 19a-571 is unconstitutional as allowing for the intentional hastening of a patient's death, but rather, that the Fourteenth Amendment mandated that there be compliance with Connecticut General Statutes Section 19a-571 in the removal of life support.

In addition, the petition is flawed as being premised on petitioner's misstatement of fact as to whether any evidence whatsoever was presented to the courts below that

the removal of life support[5] did anything other than to let a patient die. In fact, it was the dearth of expert causation testimony between the removal of life support and the patient's death that was the basis for the decisions of the courts below.

In sum, petitioners are attempting to "create" a "federal case" that was not presented to the courts below. The case presented below was and is nothing more than a State court malpractice claim involving nothing other than issues of well settled State law. The court of appeals' ruling was proper in all respects, and respondents respectfully urge this Honorable Court to deny the petition for writ of certiorari.

A. Neither the Record Nor the Decision Below Raises the Question Presented by the Petition

The general rule is that this Court does not decide questions not raised or involved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). An argument not advanced below and not forming the basis of the decision below is generally not addressed by the Supreme Court. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n.7 (1996). A further related principle is that an argument inadequately preserved will not be considered by the Supreme Court. *Auer v. Robbins*, 519 U.S. 452, 464 (1997). As set forth below, respondents contend that the aforesaid general rules should be applied here.

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[5] Although phrased as the removal of life support, in actuality the mechanical ventilator was not removed, but was placed on patient-assisted ventilation, by which the machine would breathe for the patient if she made any attempt to breathe on her own. *Law v. Camp*, 116 F. Supp. 2d at 301.

The case below, as it involved the hospital defendants, involved the issue of whether the failure to proffer expert medical testimony as to standard of care, breach and causation rendered claims of medical malpractice and/or corporate negligence insufficient as a matter of law. In the face of the admitted absence of expert testimony as to the above, petitioner argued that Connecticut General Statutes Section 19a-571 could be used to engraft a legislative standard of care on the hospital defendants with regard to the removal of life support. Rather than arguing that the statute was unconstitutional, petitioner argued that the defendants had violated the statute and, therefore, he had established liability.

The issue actually decided by the courts below is that claims of medical malpractice and/or corporate negligence under Connecticut law will fail in the absence of expert testimony that the alleged conduct was a proximate cause of the claimed injury. *Law v. Camp*, 116 F. Supp. 2d at 305, 310. This proposition is boilerplate Connecticut law and hardly involves a novel issue of State law. *See Zuchowicz v. United States*, 140 F.3d 381, 389 (2d Cir. 1998).

The petition for certiorari is further improper in that it is premised upon the incorrect assertion that evidence was presented below that the removal of life support resulted in the intentional hastening of a patient's death. As noted by the district court, petitioner offered no expert opinion to establish that the defendants' alleged negligence was a proximate cause of Mrs. Law's death. In addition to the absence of such testimony, the district court relied upon Connecticut law, holding that the removal of life support is not a proximate cause of death. *Law v. Camp*, 116 F. Supp.

2d at 304; *see McConnell v. Beverly Enterprises – Connecticut, Inc.*, 209 Conn. 692, 710, 553 A.2d 596, 605 (1989) (where the patient is in a terminal condition, removal of life support systems is not the "death-producing agent.")

Not only was the constitutionality of Connecticut General Statutes Section 19a-571 not presented to the courts below, the decisions of such courts were not based upon the statute the petitioner now wishes to challenge. The district court, as affirmed by the court of appeals, held that it did not need to rely upon the statute to determine the matter as petitioner had failed to establish that there was any causal connection between the claimed negligence and the death. *Law v. Camp*, 116 F. Supp. 2d at 304. As such, the issue petitioner asserts herein was not presented to the courts below and did not form the basis for the courts' decisions.

Moreover, the Fourteenth Amendment claim that petitioner asserts herein was not raised at all before the district court. Further, the only mention of the Fourteenth Amendment before the court of appeals was not that Connecticut General Statutes Section 19a-571 is unconstitutional, but rather that the Fourteenth Amendment required that there be compliance with the State statute in order to remove life support systems.

Any assertion that the Fourteenth Amendment justifies the granting of the petition for certification is misplaced given the absence of the requisite State action at any level of the proceedings. Despite not being appropriately raised and preserved before the district court, the court of appeals addressed this claim by appropriately

denying same in the absence of State action. The claim that petitioner attempts to put forth not only was not presented to the courts below, but would not have been capable of presentation given the absence of State action.

The opinion of the court of appeals is much less complex and far reaching than petitioner makes it out to be. The courts below simply held on a settled matter of State law. The holding was proper in all respects and does not call for review by this Court.

B. The Second Circuit's Ruling Does Not Conflict with Either *Cruzan v. Mo. Dept. of Health* or *Vacco v. Quill*

Petitioner's claim that certiorari is warranted because the decision of the court of appeals conflicts with those of this Court in the cases of *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990) and *Vacco v. Quill*, 521 U.S. 793 (1997). This claim is devoid of merit.

Petitioner's argument of conflict is premised on the misstatement as to the issues presented and decided by the courts below. As set forth above, the question of whether Connecticut General Statutes Section 19a-571 permits the intentional hastening of a patient's death in violation of the Fourteenth Amendment was not, and could not, be presented. As set forth above, this claim factually and legally was not presented or decided by the courts below.

In both *Cruzan* and *Vacco*, this Court was confronted with State action and constitutional challenges to State statutes. In *Cruzan* v. *Mo. Dept. of Health*, 497 U.S. at 269-285, this Court held that the United States

Constitution did not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life–sustaining treatment be proved by clear and convincing evidence. This Court held that the liberty interest to refuse unwanted medical treatment embodied in the Fourteenth Amendment was not violated by the procedural requirement by the State of Missouri. *Id.* at 280-285.

Petitioner's apparent claim of inconsistency with the decision in *Cruzan* v. *Mo. Dept. of Health* is additionally without merit as being based on an incorrect interpretation of this decision as somehow constitutionally mandating certain procedural requirements in State statutes addressing the withdrawal of life support.

Similarly, petitioner's argument of inconsistency of the decision of the court of appeals with *Vacco v. Quill*, 521 U.S. 793, is misplaced. In *Vacco v. Quill*, 521 U.S. at 799-809, this Court held that a New York statute making it a crime to aid another to commit or attempt suicide was not violative of the Equal Protection Clause of the Fourteenth Amendment. In so holding, this Court held that the distinction between letting a patient die and making a patient die was important, logical, rational, well established and comported with fundamental legal principles of causation. *Id.*

Petitioner's claim of inconsistency with the decision in *Vacco v. Quill* is also premised on an incorrect interpretation of the decision of the court of appeals. The decision of the court of appeals in no way addressed the Equal Protection distinction addressed by the *Vacco* case.

In sum, the decision of the court of appeals is a decision involving questions of State law that in no way involves, let alone conflicts, with the decisions of this Court. The petitioner's claims to the contrary are based on a flawed interpretation of the decisions of this Court as well as the decision of the court of appeals.

C. The Decision of the Second Circuit Involves the Interpretation of State Law and There Is No Compelling Reasons Warranting the Grant of the Petition

The petitioner urges as a basis for the granting of the petition for a writ of certiorari that the courts below misinterpreted the provisions of Connecticut General Statutes Section 19a-571 so as to justify the granting of the petition. This claim is legally untenable.

As with the other bases of the petition, this claim is likewise premised on a basic lack of understanding of the nature of the case below. Neither the district court nor the court of appeals expressly determined whether Connecticut General Statutes Section 19a-571 established a legislative standard of care, the breach of which would constitute negligence per se. Consequently, neither court below expressly determined whether there was compliance with the statute's provisions. Rather, the courts below, relying on long established principles of Connecticut law, held that there was an absence of the requisite expert testimony regarding proximate cause to sustain medical malpractice and/or corporate negligence claims.

The case at bar, therefore, does not involve far reaching issues of Federal law, but rather represents the genre of cases where a construction of State law was agreed upon by the two lower courts. In such circumstances, review by petition for a writ of certiorari is rarely appropriate. *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). This is particularly true, where as here, the issue involved is one of boilerplate State law.

The decisions of the district court and the court of appeals were premised on the dearth of expert testimony as to standard of care, breach and/or causation in a medical malpractice and corporate negligence case. The decisions of the courts below are nothing more than consistent interpretations of State law that have no import beyond the parties and circumstances of this case.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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